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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 312

THE BALTIMORE AND OHIO RAILROAD COMPANY ET AL.,

Appellants,

v.

THE UNITED STATES OF AMERICA ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

STATEMENT AS TO JURISDICTION.

T. P. HEALY,
M. CARTER HALL,
H. D. BOYNTON,
T. H. WILLCOX,
E. RANDOLPH WILLIAMS,
J. F. ESHELMAN,
E. L. BEACH,
Counsel for Appellants.

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STATEMENT AS TO JURISDICTION.

The appellants, in support of the jurisdiction of the Supreme Court to review the above-entitled cause on appeal, respectfully represent:

(a) The Statutory Provisions Sustaining Jurisdiction.

Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, Ch. 229, 43 Stat. 936, 938 (U. S. C. Tit. 28, Sec. 345), provides as follows:

"A direct review by the Supreme Court of an interlocutory or final judgment or decree of a District Court may be had where it is so provided in the following Acts or parts of Acts, and not otherwise:

* * * * * * *

"(4) So much of 'An Act making appropriations to supply urgent deficiencies in appropriations for the fiscal year 1913, and for other purposes,' approved October 22, 1913, as relates to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money."

The Urgent Deficiencies Act of October 22, 1913, Ch. 32, 38 Stat. 208, 219-220 (U. S. C. Tit. 28, Sec. 41 (28), 47 and 47-a) confers jurisdiction upon the district court of suits brought to enjoin, set aside, annul, or suspend "in whole or in part any order of the Interstate Commerce Commission," and, with respect to review by the Supreme Court of decrees entered in such suits, provides as follows:

"A final judgment or decree of the District Court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases."

(b) **Date of Decree, and Date of Application for Appeal.**

The final decree sought to be reviewed was made and entered on December 31, 1934.

The application for appeal was presented on February 26, 1935, together with an assignment of errors.

(c) Nature of the Case and Rulings Below.

The appellants, who are carriers operating in official classification territory, were petitioners below, and will be referred to herein as "petitioners". They appealed from the decree of the lower court, consisting of three judges under the Urgent Deficiencies Act, which dismissed their petition brought to enjoin, set aside, annul and suspend an order of the Interstate Commerce Commission made on January 8, 1934, in the proceedings designated as Docket Nos. 24069 and 24160, prescribing a new basis of divisions of revenue from joint rates on citrus fruit moving from points of origin in Florida to destinations in official classification territory. The effective date of the said order of the commission was afterwards extended from time to time. The said order purported to prescribe reasonable divisions for the future. Petitioners were also therein directed to readjust their divisions retroactively on all shipments moving since November 22, 1930. The order, in so far as it relates to future divisions, while it became effective July 1, 1934, is a continuing order, and in its retroactive aspect, construed by the court below to mean merely a requirement to restate accounts, becomes effective March 11, 1935. The original order, and its subsequent extensions, are herein, for convenience, referred to as "the order".

The commission in the proceeding above outlined purported to act under authority contained in paragraph (6) of Section 15 of the Interstate Commerce Act, which reads as follows:

> "Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable,

or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge."

After a hearing, the commission found that the existing divisions of the revenue of the joint rates on citrus fruit applying between points in Florida and points in official territory were not justified in the following language:

"We find nothing in the record supporting the view that the Eastern lines are entitled to such a large share of the revenue as that accruing from the amounts they

> have withheld since November 9, 1928. The worse financial condition of the southern lines negatives such a view."

It thereupon prescribed a new basis of divisions of such joint rates between said points, which it declared to be just, reasonable, and equitable and required retroactive adjustment of divisions to November 22, 1930, on all shipments involved in Docket No. 24069.

The effect of the prescribed divisions is to decrease the revenues of petitioners operating in official classification territory, and to increase correspondingly the revenues of the southern lines. Based on the 1929 movement, enforcement of the order for the future will take in excess of $300,000 of revenue per annum from official territory railroads and transfer that amount of revenue to railroads in southern territory. In addition, its retroactive application would require the payment by official territory railroads to southern railroads of a sum in excess of $1,000,000.

Petitioners contended in the lower court, and will contend here, that the commission's order prescribing the new basis of divisions is unlawful and void because (a) the prescribed divisions are confiscatory in contravention of the Fifth Amendment to the Constitution and in violation of Section 15(6) of the Interstate Commerce Act, in that the divisions or proportions of the joint through rates on citrus fruit prescribed for northern lines are insufficient as to particular hauls, as to individual carriers, and as to northern lines in the aggregate to pay operating expenses and taxes plus a reasonable return on property value fairly attributable to the service of transporting citrus fruit; (b) the order is arbitrary, in excess of the commission's statutory powers, unlawful and void because the commission subordinated all findings and facts, which under Section 15(6) of the Interstate Commerce Act it is required to consider to the element of alleged financial

need; (c) the order is in excess of the commission's statutory powers, unlawful and void, in that the commission, in purporting to give "due consideration" to "a fair return" on railway property as required by Section 15(6) of the Interstate Commerce Act, considered the rates of return of the southern lines from the total business of such lines instead of a reasonable return on southern lines' property fairly attributable to the service of transporting citrus fruit, a commodity which the commission found "was by far the most lucrative traffic" which the principal defendant carrier enjoyed.

(d) **Cases Believed to Sustain the Jurisdiction of This Appeal.**

Akron, C. & Y. Ry. Co. v. *United States*, 261 U. S. 184, 189.

United States v. *Abilene & Southern Ry. Co.*, 265 U. S. 274, 280.

Brimstone Railroad & Canal Co. v. *United States*, 276 U. S. 104.

Beaumont v. *United States*, 282 U. S. 74.

All of which cases involved similar appeals from orders of the commission fixing divisions of joint rates; also

St. Louis & O'Fallon Railway Co. v. *United States*, 279 U. S. 461, 482.

Baltimore & Ohio R. R. Co. v. *United States*, 279 U. S. 781, 784.

Virginian Railway Co. v. *United States*, 272 U. S. 658, 663.

Chicago Junction Case, 264 U. S. 258.

Louisville & Nashville R. R. Co. v. *United States*, 238 U. S. 1.

United States v. *The Baltimore & Ohio R. R. Co.* 225 U. S. 306.

We respectfully submit that this Court has jurisdiction of this appeal by virtue of Section 238 of the Judicial Code as amended by the Act of February 13, 1925.

Respectfully submitted,

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Richmond, Virginia, February 26, 1935.

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